IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 19TH MARCH 2007 / 28TH PHALGUNA 1928

SA.No. 392 of 1993()

AS.311/1990 of DISTRICT COURT, THRISSUR
OS.392/1984 of MUNSIFF COURT,CHAVAKKAD
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APPELLANTS/APPELLANTS/DEFENDANTS 2,11,12,15,16 to 18
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1. VAREED, (DIED)
S/O.PULIKKOTTIL KOCHOUSEPH,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK.

(APPELLANTS 2 ONWARDS ARE RECORDED AS THE LEGAL HEIRS OF DECEASED 1ST APPELLANT VIDE ORDER DATED 24/8/04 IN MEMO OF 4410/04).

2. ANNAMMA,
W/O.VAREED, PULIKKOTTIL HOUSE,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK.

3. JESSY, D/O.PULIKKOTTIL VAREED,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK.

4. JOICY, D/O.PULIKKOTTIL VAREED,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK.

5. JAMES,
S/O.PULIKKOTTIL VAREED,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK.

6. PRINCY,
D/O.PULIKKOTTIL VAREED,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK.

7. LALY,(MINOR)
D/O.PULIKKOTTIL VAREED, REPRESENTED
BY GUARDIAN AND FATHER VAREED,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK.

BY ADV. SRI.N.P.SAMUEL

RESPONDENTS/1ST RESPONDENT/PLAINTIFF

KURIAN ALIAS PAPPACHAN,

S/O.PULIKKOTTIL FRANCIS, (DIED)
CHITTATTUKARA DESOM, CHAVAKKAD TALUK,
THRISSUR DISTRICT. (LRS IMPLEADED). ADDL.RESPONDENTS 2 & 3
ADDL.R2. ALPHONSE,
W/O.KURIAN ALIAS PAPPACHAN,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK
THRISSUR DISTRICT, 680 511.

ADDL.R3. FEMY,
D/O.KURIAN ALIAS PAPPACHAN,
CHITTATTUKARA DESOM, CHAVAKKAD TALUK
P.O.CHITTATTUKARA, THRISSUR DIST.
Pin.680 011.
(ADDL. RESPONDENTS 2 AND 3 ARE IMPLEADED AS THE LRS OF DECEASED RESPONDENT AS PER ORDER DT. 23/6/06 IN I.A.1221/04.

BY ADV. SRI.V.O.JOHN,JOSEPH THOMAS,K.J.ANTONY FOR R1
SRI.JIMMY JOHN VELLANIKARAN FOR R2 AND R3

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19/ 3/ 2007 THE COURT ON 19/03/2007 DELIVERED THE FOLLOWING:

ORDER ON C.M.P. No.946/93 in S.A. No.392/93

19.3.07 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.392 OF 1993

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Dated this the 19th day of March, 2007

JUDGMENT

Defendants 2,11, 12, 15 and 16 to 18 in O.S.392/84 on the file of Munsiff Court, Chavakkad are the appellants. First respondent was the plaintiff. On the death of first respondent, respondents 2 and 3 were impleaded as his legal heirs. On the death of first appellant other appellants were recorded as his legal heirs. First respondent plaintiff filed the suit seeking recovery of possession of the plaint schedule property. Plaint schedule property is building No.187/276 in R.S. No.45/9 of Brammakulam Village. Case of plaintiff was that plaint schedule building originally belonged to his predecessor Pulikottil Tharu and it was granted on rent to Velukutty under Ext.A1 registered rent deed dated 17.3.1923, and after Velukutty surrendered possession of the building, for the purpose of his

residence, Kochouseph, the predecessor in interest defendants 1 and 2 obtained it and he was residing therein and while so Tharu died and his legal heirs divided the properties under Ext.A2 partition deed whereunder the property was alloted to Francis and Kochouseph was continuing as the tenant of Francis after a fresh rental arrangement dated 1.1.1960 and he was residing there with his family and on his death his tenancy rights devolved on defendants 1 and 2 the children and on the death of Francis, as per Ext.A3 Will executed by Francis, his right over the property was bequeathed in favour of plaintiff and he has title to the property. While so, claiming that he is a Kudikidappukaran and is entitled to purchase kudikidappu in respect of 10 cents of the property, first defendant filed O.A.3760/1970 before Land Tribunal which was dismissed on 18.11.1972. Plaintiff sent a lawyer notice terminating the tenancy demanding surrender of possession and a reply was sent by defendants contending that the building was constructed by

Kochouseph and it is a kudikidappu. The plea of kudikidappu is unsustainable and so plaintiff is entitled to get a decree for recovery of possession on the strength of his title with future mesne profits.

2. Defendants 1 and 3 jointly filed a written statement denying the lease set up contending that the building was constructed by Kochouseph on the licence granted permitting Kochouseph to construct a building on the land and licence is irreovacable and therefore plaintiff is not entitled to recover possession of the property. Defendants 2 and 11 filed a joint written statement contending that Kochouseph was permitted to construct a building by Tharu and pursuant to the licence Kochouseph constructed the building and it is a kudikidappu and Kochouseph had constructed a building and was residing therein and it is a permanent structure and amount was spent for the construction and plaintiff is not entitled to the decree sought for. Learned Munsiff framed the necessary issues. As

kudikidappu was claimed and question of kudikidappu raised arises for consideration, learned Munsiff referred that question to Land Tribunal under section 125(3) of Kerala Land Reforms Act. Land Tribunal rendered a finding that Kochouseph had other properties where he could erect a hut and therefore he is not a kudikidappukaran and defendants are not entitled to kudikidappu right. On receipt of the finding of the Land Tribunal, learned Munsiff marked Exts.A1 to A8 and Exts.B1 to B6 and accepting the finding of the Land Tribunal held that defendants are not entitled to kudikidappu right. Learned Munsiff also held that defendants did not adduce any evidence to prove that the licence is irrevocable. Holding that plaintiff is entitled to recover possession on the strength of title, suit was decreed. Appellants challenged the decree and judgment before District Court, Thrissur in A.S.311/1990. Learned District Judge on reappreciation of evidence confirmed the decree and

judgment passed by the learned Munsiff and dismissed the appeal. It is challenged in the Second Appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1) Whether appellants are kudikidappukars entitled to the benefit of the Kerala Land Reforms Act?

2) Even if the predecessor in interest of the first appellant who constructed the homestead on the basis of permission obtained from the owner died whether the irrevocable licence is not heritable and if so, whether plaintiff is entitled to the decree for recovery of possession granted by courts below?

4.Learned counsel appearing for appellants and respondent were heard.

5. Though defendants claimed that Kochouseph the father of defendants 1 and 2 constructed the building as permitted by Tharu, the predecessor in interest of the plaintiff, and therefore it is a

kudikidappu, Land Tribunal and first Appellate Court, on the evidence found that defendants are not entitled to kudikidappu right. Though appellants in the appeal memorandum contended that the question of entitlement to kudikidappu right has to be decided on the status of the alleged kudikidappukaran before 1.1.1970, in view of the settled legal position that a kudikidappu can be created even after 1.1.1970, the said contention will not stand. Courts below found that Kochouseph was having land exceeding two acres. No evidence was adduced to prove that the said land was not fit enough to erect a homestead. Therefore the Land Tribunal and the first Appellate Court rightly found that appellants or the other defendants are not entitled to the kudikidappu right. That finding of the courts below is perfectly correct.

6. The main argument of learned counsel appearing for appellants was that the right claimed by defendants under section 60(b) of Indian

Easement Act was not considered by first Appellate Court and was not properly considered by the trial court and evidence establish that it was Kochouseph who constructed the building which is a permanent structure incurring expenses acting on the licence and therefore licence is irrevocable. It was argued that the right of an irrevocable licensee under section 60(b) of Indian Easement Act is heritable, though not alienable and on the death of Kochouseph that right devolved on his sons defendants 1 and 2 and therefore plaintiff is not entitled to the decree granted by the courts below.

7. In the written statement filed by defendants including appellants the necessary ingredients to attract Section 60(b) of Indian Eastement Act was pleaded. It was contended that a licence was granted by the original owner Tharu in favour of Kochouseph permitting him to erect a building. It was also contended that acting on that licence a permanent building was constructed incurring expenses. It was also contended that on

the death of the original licensee, his rights devolved on his children, first appellant and first defendant. Learned counsel relied on the decision of a learned single Judge of this court in **Mariam v. Choolan (1979 KLT 650)** in support of his submission. Learned counsel appearing for respondent argued that there is no evidence to prove the irrevocability of the licence and no oral evidence was adduced by appellants or other defendants and they are not entitled to claim the benefit under section 60(b) of the Act. It was argued that defendants have no case that there is a registered deed of licence and therefore the claim under section 60(b) will not lie.

8. A licence does not create any interest in immovable property and therefore on the ground that there is no registered deed of licence, respondents are not entitled to contend that defendants are not entitled to the benefit conferred under section 60 (b) of Indian Easement Act. The definition of Section 52 makes it clear that a licence does not

create an interest in the property. Section 60 also does not provide that the benefit could be claimed only by a licensee under a written licence deed or a registered licence deed.

9. Section 60(b) provides that a licence may be revoked by the grantor unless the licensee acting upon the licence has executed a work of permanent character and incurred expenses in the execution. Therefore when the defendants contended that Kochouseph was a licensee and acting upon the licence Kochouseph constructed a building of a permanent character incurring expenses, it cannot be said that defendants have not pleaded the necessary ingredients to claim the benefit under section 60(b) of the Indian Easement Act. Chandrasekhara Menon,J. in **Mariam's case (supra)** had occasion to consider the question whether a person who erected a house acting upon a licence, who could have otherwise claimed kudikidappu, is a licensee and if so whether such a licensee could claim that it is an irrevocable licence and if so

whether the right is heritable on his death. It was held:

> "According to the petitioners, the permission was granted to the father of the 1st respondent to reside in the premises and it is also stated before me that permission had been granted to the respondent's father to have the use and occupation of the land for the purpose of erecting a homestead. There is no evidence in the case as to when the respondent's father died. If it is a case where the respondent's father died after the Act, then under section 78 his right would have devolved on his heirs. S.78 says that the rights of a

kudikidappukaran in his kudikidappu shall be heritable but not alienable except to any person mentioned in sub-clause (a) or sub-clause (b) of clause (i) of sub section (1) of S.75. If he had died before the Kerala Land Reforms Act came into force, he was a kudikidappukaran in the nature of the permission granted to him under the general law and under the general law the position of the kudikidappukaran is more or less in the nature of a licensee who in pursuance of the licence had put up a building on a land. If a building had been put up in pursuance of such licence the

> licence had become irrevocable as between the original parties. It is well settled that the right of such a licensee is heritable though not alienable. (See Amjad Khan v. Shufiuddin Khan (1925 All.203). It is useful to refer to Nasirul Zaman Khan v.Azimullah (28 All.741), Motilal v. Kabi Mandar (19 C.L.J.221),Surnomoyee v. Chandar (12 C.L.J.443) etc. cases referred to by Katiar in his "Law of Easements and Licenses" 3rd Edition, at page 405."

It cannot be disputed that the right of an irrevocable licensee is heritable, though not alienable. If Kochouseph had an irrevocable licence as provided under section 60(b), defendants 1 and 2

are entitled to inherit that right in which event plaintiff is not entitled to recover possession of the building. Unfortunately this aspect was not considered by the courts below. The trial court answered issue No.9 framed on the claim of irrevocable licence in two sentences stating that no evidence was adduced to prove the contention. The first Appellate Court did not consider the question at all. Learned counsel appearing for appellants pointed out that Exts.B2 to B6 series show that atleast from 1963 onwards building tax was being paid by Kochouseph and the house was registered as owned by Kochouseph and how this happened if the building was constructed by Tharu as claimed by plaintiff was not explained and therefore it can only be held that the building was constructed by Kochouseph acting on the licence and therefore it is to be held that the licence is irrevocable.

10. As this question was not considered by the trial court on the materials and was not considered

by the first Appellate Court at all, interest of justice warrants that this question is to be decided by the trial court before granting a decree for recovery of possession. As no evidence was adduced by either parties on this aspect, it is necessary to permit the parties to adduce further evidence also.

The appeal is therefore allowed. The judgment and decree passed by learned Munsiff as confirmed by learned District Judge are set aside. O.S.392/1984 is remanded back to Munsiff Court, Chavakkad for deciding the question whether Kochouseph was lessee or a licensee and if a licensee whether the licence was irrevocable under section 60(b) of Indian Easement Act. The parties are entitled to adduce evidence on this question. Learned Munsiff has to decide this question in accordance with law. If it is found that Kochouseph is an irrevocable licensee and his rights devolved on defendants 1 and 2, plaintiff is not entitled to the decree for recovery of

possession. On the other hand, if on the evidence court finds that Kochouseph was not a licensee or even if a licensee the licence was not irrevocable the plaintiff is entitled to recover possession of the property on the strength of title. Parties are directed to appear before the learned Munsiff on 24.5.07. Send back the records forthwith.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

I.A.NO.955. /05
IN
M.S.A.NO.1/81

ORDER

23RD MARCH, 2007